

On February 20, 2007 the Office referred appellant, together with a statement of accepted facts and a list of questions, to Dr. R. Michael Loper, an otolaryngologist, for an examination on March 8, 2007. Dr. Loper found that appellant had bilateral mild to moderately severe high frequency sensorineural hearing loss caused by noise exposure at work. Audiometric testing performed on March 8, 2007 revealed, at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps): right ear decibel losses of 5, 0, 5 and 15; left ear decibels of 5, 5, 5 and 25. Dr. Loper stated that the audiometric test results were valid and representative of appellant's hearing sensitivity. He noted that appellant experienced occasional ringing in his ears. Dr. Loper indicated that no previous audiometric results were available for his review.

On March 19, 2007 the employing establishment submitted information regarding appellant's hearing loss claim. On February 20, 2007 A.M. Hayes, an employing establishment audiologist, stated that appellant was exposed to hazardous noise while working as a firefighter. He indicated that audiologic records revealed that his hearing had progressed from mild high frequency hearing loss in both ears in 1987 to moderately severe noise-induced hearing loss in the right ear and severe noise-induced hearing loss in the left ear. The employing establishment provided audiometric test results obtained by technicians between 1987 and 2006. The test results were not certified by a physician.

On March 21, 2007 Dr. A.E. Anderson, Jr., an Office medical adviser, reviewed the results of the audiometric testing performed for Dr. Loper and applied the Office's standardized procedures. He totaled the decibel losses of 5, 0, 5 and 15 in the right ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps at 25 decibels and divided by 4 to obtain the average hearing loss of 6.25 decibels. This average was then reduced by 25 decibels to equal 0 decibels which was multiplied by the established factor of 1.5 to compute 0 percent impairment in the right ear. Dr. Anderson totaled the losses of 5, 5, 5 and 25 in the left ear at 40 decibels and divided by 4 to obtain the average hearing loss of 10 decibels. This average was then reduced by 25 decibels to equal 0 decibels which was multiplied by the established factor of 1.5 to compute 0 percent impairment in the left ear. Dr. Anderson indicated that appellant had no ratable binaural hearing loss, according to the standardized Office procedures for determining entitlement to a schedule award. He indicated that a hearing aid was not authorized.

By decision dated March 22, 2007, the Office denied appellant's claim for a schedule award on the grounds that he had no ratable hearing loss. The Office also denied medical benefits, noting that the weight of the medical evidence established that he would not benefit from hearing aids.

Appellant requested reconsideration. He indicated that Dr. Loper did not compare previous audiometric test results to his March 8, 2007 test results. Appellant submitted a copy of a February 14, 2007 memorandum from a Joseph Whalen and the February 20, 2007 memorandum from Mr. Hayes which were previously of record.

On April 19, 2007 the Office denied appellant's reconsideration request on the grounds that the evidence submitted did not warrant further merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating losses.³

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁴ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁵ Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁶ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.⁸ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁹

ANALYSIS -- ISSUE 1

The Office's medical adviser reviewed the results of the audiometric testing performed on March 8, 2007 for Dr. Loper and properly applied the Office's standardized procedures. He totaled the decibel losses of 5, 0, 5 and 15 in the right ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps at 25 decibels and divided by 4 to obtain the average hearing loss of 6.25 decibels. This average was then reduced by 25 decibels to equal 0 decibels which was multiplied by the established factor of 1.5 to compute a 0 percent impairment in the right ear.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *Id.*

⁴ A.M.A., *Guides* 250 (5th ed. 2001).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

The Office medical consultant totaled the losses of 5, 5, 5 and 25 in the left ear at 40 decibels and divided by 4 to obtain the average hearing loss of 10 decibels. This average was then reduced by 25 decibels to equal 0 which was multiplied by the established factor of 1.5 to compute an 0 percent impairment in the left ear. The Office medical adviser indicated that appellant had no ratable binaural hearing loss, according to the standardized Office procedures for determining entitlement to a schedule award. The Board finds that the Office medical adviser correctly determined that appellant had no ratable hearing loss.¹⁰

The audiometric test results from the employing establishment dated 1987 to 2006 do not meet the Office's criteria to establish an employment-related loss of hearing. The audiometric test results were not certified by a physician as being accurate. The Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist.¹¹

On appeal, appellant indicates that the February 20, 2007 memorandum from the employing establishment audiologist is relevant to his claim for hearing impairment. The audiologist indicated that appellant's hearing loss had progressed from mild high frequency hearing loss in both ears in 1987 to moderately severe noise-induced hearing loss in the right ear and severe noise-induced hearing loss in the left ear. As noted, a schedule award for hearing impairment is based on the standards and procedures contained in the A.M.A., *Guides* using the decibel losses for each ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps. The audiologist did not provide current audiometric data required for application of the A.M.A., *Guides*. Additionally, the audiologist's memorandum does not comply with several other Office requirements for a hearing loss impairment rating such as an otologic examination performed by a certified otolaryngologist.¹² For these reasons, the audiologist's memorandum is not sufficient to establish the degree of appellant's hearing impairment.

¹⁰ The Board notes that Dr. Loper included a finding of occasional ringing in appellant's ears. This condition is called tinnitus. The A.M.A., *Guides* allows for compensation of up to five percent for tinnitus "in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living." A.M.A., *Guides* 246; *Leslie M. Mahin*, 55 ECAB 311 (2004). The Board has held that there is no basis for paying a schedule award for a condition such as tinnitus unless the medical evidence establishes that the condition caused or contributed to a permanent and ratable loss of hearing under the Act's schedule award provisions. *Donald A. Larson*, 41 ECAB 947 (1990); *Charles H. Potter*, 39 ECAB 645 (1988). The medical evidence in this case does not establish that appellant has a tinnitus condition that caused or contributed to a permanent and ratable loss of hearing. Consequently, appellant is not entitled to a schedule award for a tinnitus condition.

¹¹ See *Robert E. Cullison*, 55 ECAB 570 (2004).

¹² See *Vernon Brown*, 54 ECAB 376 (2003).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by setting forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and new pertinent evidence not previously considered by the Office.¹⁴ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁵

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant asserted that Dr. Loper did not compare previous audiometric test results to the March 8, 2007 testing. In its referral, the Office asked Dr. Loper to comment on appellant’s hearing at the beginning of his noise exposure at work and compare the earlier audiometric findings to the present findings, if the earlier audiometric data was available. The data was not available to Dr. Loper because it was not submitted by the employing establishment prior to his examination of appellant. In this case, Dr. Loper found that appellant’s hearing loss was work related. The remaining issue was whether appellant’s hearing loss was ratable according to the Office’s standardized procedures for determining hearing loss impairment. The earlier audiometric test results did not meet the Office’s standardized procedures and criteria to establish a ratable loss of hearing. Consequently, appellant’s argument, that Dr. Loper did not consider early audiometric test results, does not constitute relevant and pertinent evidence or relevant legal argument not previously considered by the Office. He also submitted documents previously of record. Because these documents were previously reviewed, they do not constitute relevant and pertinent evidence not previously considered by the Office.

The Board finds that appellant did not submit arguments or evidence: showing that the Office erroneously applied or interpreted a specific point of law, advancing a relevant legal argument not previously considered or constituting relevant and new pertinent evidence not

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ *Id.* at § 10.608(b).

considered previously by the Office. Therefore, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has no ratable hearing loss entitling him to a schedule award. The Board further finds that the Office did not abuse its discretion in denying his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 19 and March 22, 2007 are affirmed.

Issued: December 20, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board